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FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SEPRETARY

In re Applications of

RAYMOND W. CLANTON

LOREN F. SELZNICK

File No. BPH-911216MD

For Construction Permit for a

New FM Station on channel 279A
in El Rio, California

To: Honorable John M. Frysiak Administrative Law Judge

REPLY FINDINGS/CONCLUSIONS FOR LOREN F. SELZNICK

Loren F. Selznick respectfully submits this Reply to the "Limited Proposed Findings of Fact and Conclusions of Law" filed by Raymond W. Clanton on March 4, 1994 (hereinafter "CPF").

Preliminary Statement

Clanton's Limited Proposed Findings/Conclusions ("CPF")
reach the flawed conclusion that Selznick's application should be
denied because of his erroneous assertions of fact and contentions as to the governing law. Moreover, Clanton does not merely
misrepresent the evidence or miscomprehend the "record" in this
case, Clanton seriously distorts the truth and engages in an
unprincipled personal attack on Ms. Selznick. Despite the excesses of Clanton's 41-page brief, Selznick chooses not to respond in kind but, rather, to simply present the facts and pertinent FCC caselaw for the consideration of the Presiding Judge.

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I. PROPOSED FINDINGS OF FACT

A. The 1991 Financial Certification

- 1. Clanton first asserts that Selznick's 1991 cost estimates failed to include "shipping and sales taxes." CPF at ¶ 10. Clanton is wrong. Ms. Selznick testified that the figures provided in 1991 by her experienced technical adviser were based on installed equipment, which necessarily would include shipping. Tr. 88.
- 2. Clanton next asserts that Selznick omitted from her budget the FCC's \$6760 hearing fee. CPF at ¶ 11. Clanton makes an erroneous assumption. Absent evidence to the contrary, the FCC's longstanding policy is to assume that an applicant is meeting its current costs of prosecuting its application. See Weyburn Broadcasting Limited Partnership v FCC, 984 F.2d 1220, 1229 n.1 (D.C. Cir. 1993). Selznick paid the hearing fee at issue more than a year ago.
- 3. Clanton also asserts that Selznick omitted from her 1991 budget both her moving costs and her California living expenses.

 CPF at ¶ 12. Clanton again makes an erroneous assumption.

 First, Clanton does not and cannot cite a single authority for

It is irrelevant that Ms. Selznick may or may not have remembered at hearing the current sales tax in California. Clanton, who knew Selznick's precise 1991 equipment proposal, failed to confront Ms. Selznick at hearing with a single instance where the equipment she had specified was being purchased in California and subject to California sales tax.

his contention that Ms. Selznick's "FM budget" must include personal living costs. Second, Ms. Selznick explained at hearing how her continued employment during the construction period would yield adequate funds to meet her personal living expenses. Tr. 137-8.

- 4. Clanton next asserts that Selznick lacked any committed financing source in November 1991, "shortly before the filing deadline." CPF at ¶ 13. Clanton errs in two respects. First, "November 1991" was obviously several weeks -- not "shortly"-- before the December 16, 1991 filing deadline for the El Rio FM station. Second, both Ms. Selznick and Mr. Dailey testified that they reached an agreement on his financing her station by approximately the third week of November 1991 -- three weeks before the FCC filing deadline. Selznick Exhibit 4 at ¶ 7 and at Appendix B, p 57.
- 5. Clanton asserts repeatedly that Mr. Dailey recalls that Ms. Selznick told him the station would be built for "no more" than \$350,000. CPF at ¶¶ 13, 20, 23, 41. That is simply false. Mr. Dailey stated more than once that he recalled in 1993 that the cost figure in 1991 was in the "range" of \$350,000 (Clanton Exhibit 2 at 58, 74) but he signed a sworn Declaration in August 1993 that the budget figure that he agreed in 1991 to lend to Ms. Selznick was \$360,070 (see Declaration, Appendix A to Opposition of Selznick to Petition to Enlarge, filed September 16, 1993). Moreover, when shown Ms. Selznick's precise cost figure of \$360,070 by Mr. Clanton's counsel at his deposition,

Mr. Dailey testified that he was "sure" that was the budget figure that he and Ms. Selznick had discussed in 1991. Clanton Exhibit 2 at 80.

- 6. Clanton concedes that Mr. Dailey knew in 1991 that the total cost budget "must have" included working capital but Clanton asserts that Mr. Dailey was "not clear" on how much the working capital component of the budget was. CPF at ¶ 14. Clanton assumes that Mr. Dailey's lack of perfect recall is problematic. Clanton cites no FCC precedent, however, for his contention that a lender is required to remember two years later the precise components of an approximately \$350,000 budget.
- 7. Clanton also asserts that, when Mr. Dailey agreed in 1991 to loan the needed funds, he did not state or agree to a "specific dollar figure." CPF at ¶ 16. Clanton is wrong.

 Clanton cites only to the first, preliminary conversation during which Mr. Dailey told Ms. Selznick that he would loan the funds.

 Ms. Selznick had several conversations with Mr. Dailey prior to listing him as her committed lender in the Form 301 application.

 Selznick Exhibit 4, Exhibit B at 57-8; 65. After Ms. Selznick told him in a subsequent conversation that he would need to have \$360,070 in available net liquid assets, Mr. Dailey both reviewed his current financial statement with Ms. Selznick "item-by-item" and also re-committed to loaning those funds to her. Selznick Exhibit 4 at ¶ 7, and Appendix B at 65-6.
- 8. Clanton further asserts that Mr. Dailey did not "mention the terms" of the proposed loan to Ms. Selznick. CPF at ¶ 17.

Clanton's assertion obscures the crucial fact, however, that both of them understood that the loan would be on standard commercial terms for a start-up business. Selznick Exhibit 4 at ¶ 8; Clanton Exhibit 2 at 89. Clanton's assertion also ignores the substantial record evidence of Mr. Dailey's and Ms. Selznick's extensive experience working together on other business transactions (Tr. 102-3) and also the substantial evidence that they discussed radio station financing during the year prior to the filing of Selznick's El Rio application (see Selznick's Proposed Findings, filed March 4, 1994, at ¶¶ 9-12).

- 9. Clanton next asserts that Mr. Dailey was unfamiliar with the El Rio market's specific "demographics" when he agreed to be the lender for Ms. Selznick's proposed FM station at El Rio. CPF at ¶ 18. Clanton's assertion is both erroneous and irrelevant. First, Clanton unsurprisingly does not cite any FCC precedent for his spurious claim that a lender must have specific knowledge of market demographics. Second, in this particular case, Mr. Dailey had indeed acquired considerable knowledge about FM radio and was familiar with the El Rio area. See Dailey Deposition Tr. 19, 27-8, 35-8, 41.
- 10. Clanton also asserts that Mr. Dailey had not seen Ms. Selznick's bank statements or her site assurance letter in 1991. CPF at ¶ 19. Clanton's assertion is again both erroneous and, in any event, irrelevant. First, the FCC plainly does not require that a lender "see" an applicant's site letter -- indeed, there is not even a requirement that an applicant HAVE a "site letter."

Second, although Mr. Dailey was familiar with Ms. Selznick's financial condition in 1991 (see Dailey Dep. Tr. 14-5), the FCC does not require that he -- as the proposed lender of all of the station's funds -- be familiar with Ms. Selznick's financial status. In any event, Mr. Dailey testified that dealing with Ms. Selznick was like dealing with family. Id. at 67.

- 11. Clanton asserts that Selznick "has refused" to divulge privileged communications with her counsel. CPF at ¶ 21. Despite Clanton's insinuations that Selznick is "hiding" something sinister, it is sufficient here merely to note that applicants RARELY waive the attorney-client privilege ½ and that, in this case, it is unnecessary for Ms. Selznick to do so in order to prevail on the added issues.
- 12. Clanton further asserts that Selznick neither sought nor obtained any written documentation of Mr. Dailey's loan commitment. CPF at ¶ 22. Of course, as Selznick has fully explained, ³/₂ she told Mr. Dailey in 1991 that he did not need to provide any documentation at that time. Selznick Exhibit 4 at Exhibit B, page 56. Moreover, Ms. Selznick knew in 1991 that Mr. Dailey was willing to provide whatever documentation she needed whenever she asked for it. Id.
- 13. Clanton asserts that, at the time that Ms. Selznick mentioned her \$360,070 cost estimate to Mr. Dailey in 1991, they

² See discussion, infra, at ¶ 40.

^{3/} See Proposed Findings of Fact and Conclusions of Law, filed by Selznick on March 4, 1994, at \P 21.

allegedly had not talked about Mr. Dailey providing her financing. CPF at ¶ 23. That absurd contention is belied not only by the evidence (Selznick Exhibit 4, Exhibit B at 65) but by Clanton's own Proposed Findings (CPF at ¶¶ 13-16).

- 14. Clanton next implies that Ms. Selznick and Mr. Dailey gave conflicting testimony about Ms. Selnzick's reaction to Mr. Dailey's suggestion of his brother-in-law as a possible employee at her station. CPF at ¶ 24. Clanton again is plainly wrong.

 Ms. Selznick testified not only that Mr. Dailey talked to her about possibly hiring his brother-in-law (Tr. 130) but also that she knew his brother-in-law and believed him to be experienced (Tr. 131).
- "access" Mr. Dailey's financial statement on their common computer system, then Selznick must not have had that statement "available to her," as she claimed in a September 15, 1993 affidavit.

 CPF at ¶ 25. Clanton errs. The record discloses that Selznick had access to the financial statement (Tr. 84) but she did not "access" Mr. Dailey's financial statement in 1991 because she had reviewed it with Mr. Dailey "item-by-item" during a November 1991 phone conversation (Tr. 85; 102-3).
- 16. Clanton next asserts that, when Ms. Selznick and Mr. Dailey reviewed his financial statement "item-by-item" in November 1991, "it is not known what data appeared on Dailey's computer screen." CPF at ¶ 26. Clanton is wrong again. Mr. Dailey confirmed that the financial data that they reviewed "item-by-

item" in November 1991 is the same data that appears on the November 30, 1991 financial statement that was received into evidence as Appendix A to Selznick Exhibit 4. 4/

- 17. Clanton also asserts that Ms. Selznick could not recall "the specific numbers" that Mr. Dailey and she reviewed "item-by-item" in 1991. CPF at ¶ 26. Clanton's assertion is irrelevant. Ms. Selznick testified that, in reviewing Mr. Dailey's financial statement in 1991, they considered "cash and partnership profits and partnership inventory interest as liquid." Tr. 101. Ms. Selznick further testified that she and Mr. Dailey also discussed in 1991 that Mr. Dailey expected to receive his partnership profits "within a certain amount of time." Tr. 101.
- 18. Clanton further asserts that neither Mr. Dailey nor Ms. Selznick were aware in 1991 of the FCC's definition of "net liquid assets." CPF at ¶ 27. Clanton is wrong. Ms. Selznick testified that she called Mr. Dailey to discuss his financial commitment "[a]fter reviewing both the FCC Form 301 application and the Instructions thereto and also discussing the application with my counsel Peter Tannenwald, Esq...." Selznick Exhibit 4 at ¶ 7. 5/ They reviewed his net liquid assets under the assumption that the FCC followed GAAP (generally accepted accounting principles). Subsequently, and before filing the application, Ms.

See sworn "Declaration" of Joseph P. Dailey, executed August 27, 1993, attached as Appendix A to "Opposition of Selznick to Petition to Enlarge," filed September 16, 1993.

It was during that phone conversation with Mr. Dailey that she and Mr. Dailey reviewed his current financial statement "item-by-item." Id.

Selznick confirmed that the Instructions to Form 301 specify GAAP. Tr. 103. She also confirmed the FCC's definition of "net liquid assets" in the Instructions to Form 301. Tr. 105.

- 19. Clanton next asserts that "Dailey did not mention [in 1991] anything about his liabilities to Selznick." CPF at ¶ 27. Clanton is wrong. Both Mr. Dailey and Ms. Selznick testified that, during the "item-by-item" review of his financial statement, Mr. Dailey told Ms. Selznick that he had no current liabilities other than his [\$6000] monthly mortgage payment. Clanton Exhibit 2 at 33.
- 20. Clanton also asserts that Mr. Dailey did not know "the appraised value" of his home on Novmeber 30, 1991. CPF at ¶ 31. Clanton's assertion is grossly misleading. Mr. Dailey testified that he bought his home for \$1.3 million in January 1991 and made \$50,000 in capital improvements by November 1991. Clanton Exhibit 2 at 97. Although the home apparently was not appraised for \$1.6 million until 1992, Mr. Dailey knew in November 1991 that it had been appraised within the prior twelve months for \$1.3 million. 6/
- 21. Clanton repeatedly asserts that there is no evidence that Ms. Selznick checked her interpretation of the FCC's "on hand" documentation requirement with her counsel prior to filing her 1991 application. CPF at ¶ 32, 38. Clanton is wrong for two

The Presiding Judge may take official notice of the fact that mortgages are issued only after a qualifying appraisal and, since Mr. Dailey obtained a mortgage for his Anaheim home, there would have been a \$1.3 million appraisal made for the home prior to his closing in January 1991.

reasons. First, in her direct case testimony, Ms. Selznick clearly states that she did not file her application until, inter alia, she had reviewed the Instructions to FCC Form 301 and discussed the application with her counsel. Selznick Exhibit 4 at ¶ 7. In any event, there was no real question whether Ms. Selznick had documentation on hand when whe filed her 1991 application. The documentation was stored in a law firm computer to which she had access and her close friend/colleague had told her she could have it anytime she needed it. In short, documentation was clearly "on hand."

- 22. Clanton also asserts that Selznick did not "obtain" [sic] Mr. Dailey's income after taxes until the summer of 1993.

 CPF at ¶ 33. Clanton's assertion is irrelevant. Mr. Dailey testified that Ms. Selznick knew his approximate income as a partner in the law firm (see Dailey Deposition Tr. 32-3, 91, 110) and, therefore, inferentially knew his approximate after-tax income.
- 23. Clanton next asserts that Ms. Selznick must not have read the Form 301 Instructions because, if she had, she would have discussed with Mr. Dailey the collateral and guarantee terms of his proposed loan. CPF at ¶ 39. Clanton errs again. Ms. Selznick knew that, as with any loan for a "start-up" company, the assets of the station would serve as collateral for the loan and that she would give a personal guarantee. Selznick Exhibit 4

 $[\]ensuremath{\mathcal{U}}$ Her knowledge of his income would have revealed that he was in the top tax bracket.

at ¶ 8. Mr. Dailey testified that he had that same understanding in 1991. Clanton Exhibit 2 at 89.

B. Selznick's Present Financial Qualifications

- 24. Clanton asserts that Selznick's Revised Budget of \$109,460 includes the \$3105 cost of a Hall Electronics antenna, which is about \$700 less than the Jampro antenna specified in her amended application. CPF at ¶ 47. Clanton's assertion is irrelevant. Ms. Selznick testified that her consultant Brett Miller, who was completely familiar with her engineering proposal, appears simply to have recommended a "readily substitutable" antenna that is a few hundred dollars cheaper than the Jampro antenna. Tr. 119.
- 25. Clanton next asserts that Selznick has not "verified" what used equipment would be available. Clanton's assertion is irrelevant. Ms. Selznick testified that her experienced consultant, Brett Miller, assured her that most of her equipment could be acquired "used" (Tr. 106) and, from her own experience, Ms. Selznick also knew that there was a large supply of used broadcast equipment (<u>id.</u>).
- 26. Clanton further asserts that the Revised Budget does not provide for studio rent. CPF at ¶ 49. Clanton is wrong.

 Ms. Selznick testified that she will be able to obtain up to six months free rent. Tr. 110. Because she will not need to commence renting studio space until she is ready to install studio

equipment and, because installation at her studios will not take six months (Tr. 110), it is reasonable to conclude that she will have no studio rent during the first three months of operation.

In any event, Ms. Selznick also testified that she has an \$1850 "miscellaneous" cushion for anything not expressly line-itemed in her Revised Budget. Tr. 111.

- 27. Clanton also asserts that the Revised Budget fails to include personal living expenses, alleging that Ms. Selznick proposes to use all of her net liquid assets and to "liquidate nearly all her other assets" for the FM station. CPF at ¶ 51. Clanton errs again. First, the FCC never has required that an applicant "prove" that it can meet its "personal living expenses" during the first three months of operation.

 Ms. Selznick's present financial qualification is based on the availability of "up to" \$100,700 of her net liquid assets and the availability of "up to" \$40,000 from Mr. Dailey. Since her Revised Budget is only \$109,460, it is obvious that Ms. Selznick's daily subsistence will not be as bleak as Clanton spuriously forecasts.
- 28. Clanton obliquely asserts that there may be some problem with Ms. Selznick's staffing proposals. CPF at ¶ 53. There is no such problem. Ms. Selznick testified as to one specific staffing plan but also pointed out that there are a number of ways that she, the three other fulltime employees and the part-

Ocertainly, there is nothing in the FCC's Instructions to Form 301 or any of the textual revisions to the Form 301 that even suggests that such a showing is required.

timers could cover the weekly schedule. Tr. 154-55. Moreover, if she found a few "slack" hours during the week, Ms. Selznick would fill it herself. Tr. 155. She further noted that, as a lawyer for a large New York firm, she has had far worse schedules. Tr. 157.

- 29. In further flyspecking her Revised Budget, Clanton also asserts that Selznick appears to have omitted the station's subscription to a newswire. CPF at ¶ 54. Clanton can point to no evidence, however, that Ms. Selznick's Revised Budget specifies, or that she proposes to subscribe to, a newswire.
- 30. Clanton further asserts that Ms. Selznick's Revised Budget contains no express provision for an air conditioner for the transmitter building. CPF at ¶ 55. Clanton conveniently ignores, however, Ms. Selznick's stated reliance on the \$5200 budget for the transmitter building, which reasonably implies the inclusion of air conditioning [and lights and doors and electrical outlets etc.]. Selznick Exhibit 5 at Appendix C, item A (2). Moreover, Ms. Selznick observed at hearing that her Revised Budget has a \$5000 miscellaneous category for cost overruns or items that might not be specifically included in the broad categories. Tr. 121
- 31. Likewise, Clanton asserts that the Revised Budget makes no monetary allowance for "promotions." CPF at ¶ 56. Clanton's assertion is irrelevant. Ms. Selznick explained at hearing that, in addition to trade promotion with other media, she has

had experience in a number of promotions that do not require the FM station to lay out any money. Tr. 123.

- 32. Clanton also asserts that it is unclear whether Selznick will have to pay site rentals for more than three months.

 CPF at ¶ 57. Clanton is wrong. The evidence establishes that

 Ms. Selznick has budgeted \$5000 for installation costs. Selznick

 Exhibit 5 at Appendix C.
- 33. Clanton asserts that it is unclear whether the appraiser physically inspected Ms. Selznick's two apartments, insinuating that Ms. Selznick's clear testimony to the contrary was false. CPF at ¶ 60. Clanton is playing games. Clanton cites to a particular checked box on the appraisal forms, which appears below the signature line of the review appraiser, Henry A. Salmon and does not refer to the working appraiser, H. Chuku Lee. Id. Yet, Clanton never once asked Ms. Selznick at hearing about these "checked boxes." In fact, H. Chuku Lee certified on the last page of the appraisals that he "personally inspected the property, both inside and out, and made an exterior inspection of all comparable sales listed in the report. See Appendices E & F to Selznick Exhibit 5. Accordingly, Ms. Selznick testified truthfully that the appraiser visited both of her apartments-- one visit while she was physically present. Tr. 49.
- 34. Clanton also asserts that "the record" does not contain Dailey's current financial statement. Clanton is wrong again.

 In a sworn Declaration dated August 27, 1993, which was attached as Appendix A to the September 16, 1993 "Opposition of Selznick

to Petition to Enlarge," Mr. Dailey submitted his personal financial statement as of August 27, 1993. 9/

35. Clanton further asserts that there is no basis for Ms. Selznick's understanding as to collateral for the present \$40,000 loan commitment from Mr. Dailey. CPF at ¶ 62. Clanton is wrong. Ms. Selznick testified that the understanding as to collateral is on the same basis as it was when Mr. Dailey was willing to loan up to \$360,070. Selznick Exhibit 5 at ¶ 4. 10/

II. PROPOSED CONCLUSIONS OF LAW

A. The 1991 Financial Certification

36. Clanton's conclusion that Selznick's 1991 budget "did not include a number of required items" is unpersuasive. CPF at ¶¶ 65-67. In this Reply, Selznick has refuted each of Clanton's alleged "omissions" from Selznick's 1991 budget, including the FCC hearing fee, the alleged sales tax, 11/2 Ms. Selznick's personal living expenses, etc. See discussion, supra, at ¶¶ 1-3.

⁹ It is clear that all pleadings in any hearing case conducted under the APA are part of the record for decision purposes. <u>See</u> 5 USC § 556(e).

^{10/} See discussion, supra, at ¶ 8.

In arguing that Selznick was not <u>initially</u> qualified in 1991, Clanton erroneously postulates a 5 % sales tax on Selznick's \$79,460 <u>revised</u> equipment budget. CPF at ¶ 67. Even if Clanton had not transposed the wrong numbers, however, his substantive argument is without merit. <u>See</u> discussion, <u>supra</u>, at note 1.

- 37. There also is no merit to Clanton's conclusion that Ms. Selznick did not have documentation to verify its funding sources "on hand" when she submitted her 1991 application. CPF at ¶¶ 68-71. Selznick established that she did have verifying documentation "on hand" when she submitted her 1991 application. See discussion, supra, at ¶¶ 15,21. Indeed, the interpretation of FCC policy urged by Clanton is not only not factual, it is capriciously irrational. The FCC could not rationally distinguish between verifying financial documentation that was "in hand" rather than "on hand." Does Clanton really believe that the FCC or a reviewing court would allow an applicant to be penalized simply because verifying documentation was kept "on hand" by the applicant's attorney, or kept "on hand" by the applicant's CPA, or by a lender who is willing to provide it at any time?
- 38. Likewise, there is no merit to Clanton's conclusion that Mr. Dailey and Ms. Selznick never reached a specific agreement on the amount of funds to be loaned or the terms of the loan. CPF at ¶¶ 72-76. 12/ Ms. Selznick and Mr. Dailey reached an understanding about not only the amount of funds to be loaned but also the standard commerical terms that would apply. See discussion, supra, at ¶¶ 8, 23. Clanton's contention that Ms. Selznick fatally erred in failing to obtain "a letter" from Mr. Dailey in 1991 (CPF at ¶75) is demonstrably false. See Pleasant Hope Broadcasting Co., L.P., 6 FCC Rcd 6553, 6555-6 (Rev. Bd.

^{12/} Ironically, Clanton does not accurately state Selznick's precise 1991 budget figure of "360,070." See CPF at ¶ 79(4) ("...loan of \$360,000, the number asserted by Selznick...").

1991) (applicant was financially qualified even when she did not discuss any of the terms with a lender who gave only an "oral" loan commitment to the applicant).

39. Clanton's conclusion that Selznick may not legally use Mr. Dailey's November 1991 financial statement ¹³/₁ to "prove" today that Mr. Dailey was able in 1991 to make a \$360,070 loan is also demonstrably false. That is precisely what the FCC requires. See, e.g., A.P. Walter, Jr., 6 FCC Rcd 875, 877-8 ¶ 16 (Rev. Bd. 1991).

B. THE MISREPRESENTATION ALLEGATION

40. Clanton argues that Selznick's assertion of her attorney-client privilege with respect to communications with her former FCC counsel requires a conclusion that her former counsel's advice was "adverse to Selznick's interests." CPF at ¶ 83. To the contrary, Selznick's routine and consistent assertion throughout this proceeding of her attorney-client privilege with respect to confidential communications from her counsel reflects merely the usual practice of FCC applicants to preserve "a substantial individual interest or relationship in which society has an interest..." In re Sealed Case, 676 F.2d 793, 806 (D.C. Cir. 1982). The Supreme Court has duly honored the venerable attorney-client privilege by declaring, "[n]ot even the most liberal of discovery theories can justify unwarranted inquires into the

^{13/} See Appendix A to Selznick Exhibit 4.

files and the mental impressions of an attorney." <u>Hickman v.</u>

Taylor, 329 U.S. 495, 509 (1947). 14/

41. There is also no merit to Clanton's proposed conclusion that Ms. Selznick's 1991 financial certification was an "intentional misrepresentation" because, as a "practicing attorney," she should have known that the Form 301 Instructions required her to have documentation "in her possession." CPF at ¶¶ 84-86. 15/
The short answer is that Clanton's basic premise is flawed. The Form 301 Instructions require only that an applicant have financial documentation "on hand," which Ms. Selznick had. See discussion, supra, at ¶¶ 15, 21. Moreover, contrary to Clanton's claim (CPF at ¶ 86), the record does show that she consulted with her counsel before signing the application. See Selznick Exhibit 4 at ¶ 7. Indeed, the record contains the following testimony from Ms. Selznick:

"When he [Mr. Dailey] asked if I needed a written commitment letter, I told him, based on my study of the Instructions to FCC Form 301 and from my discussions with my counsel, that I did not need a written commitment letter from him."

Id. at ¶ 7, emphasis added.

Clanton's reliance on <u>Welch Communications</u>, <u>Inc.</u>, 4 FCC Rcd 3979 (Rev. Bd. 1989) is misplaced. CPF at note 6. In <u>Welch</u>, the Review Board merely sustained the ALJ's denial of a protective order because the applicant had waived the attorney-client privilege. <u>Id.</u>, 4 FCC Rcd at 3981 ¶ 13. Here, Selznick has not waived her privilege.

^{15/} Clanton fails to point out, however, that Ms. Selznick is <u>not</u> a communications lawyer and that she had never before filed an FCC application.

- 42. Similarly, there is no merit to Clanton's proposed conclusion that Selznick misrepresented her reliance on the Form 301 Instructions in confirming that Mr. Dailey had sufficient "net liquid assets" to make his proposed loan. CPF at ¶¶ 87-8. Rather, the evidence establishes that, prior to filing her 1991 application, Ms. Selznick both understood the FCC Form 301's definition of "net liquid assets" and also confirmed that Mr. Dailey had more than sufficient net liquid assets to loan up to \$360,070. See discussion, supra, at ¶¶ 7, 13, 16-20, 22-23.
- Finally, the evidence belies Clanton's desperate argument that Selznick's negotiations with another lender "had not succeeded" and that, rushing into a last-minute deal, "[s]he was willing to falsely certify in order to get on file." CPF at ¶ 95. As discussed supra, Ms. Selznick's agreement with Mr. Dailey came together in the third week of November, after she found it difficult to reach Mr. Cephas for a "follow up" to his statement of interest but long before the December 16, 1991 filing deadline. See ¶¶ 4,7, supra. In point of fact, Ms. Selznick had given years of thought to owning an FM radio station, she spent months preparing to file her El Rio application and she engaged in substantial efforts to ensure that she would be a financially qualified applicant. Ms. Selznick did not misrepresent her financial qualifications in 1991. Compare Aspen FM, Inc., 6 FCC Rcd 1602, 1603 ¶ 8 (1991) (applicant never reviewed financial statement of lender, who was not known to her personally); Texas Communications Limited Partnership, 7 FCC Rcd 3186, 3187 ¶ 7

(general partner who certified never reviewed lender's financial statement nor knew him personally).

C. Selsnick's Present Financial Qualifications

- 44. There is no merit to Clanton's proposed conclusion that Selznick's Revised Budget omits and underestimates numerous items. CPF at ¶¶ 98-104. Selznick has refuted Clanton's specific assertions. See discussion, supra, ¶¶ 24-33. Selznick was entitled to rely on her own experience and the advice of experts. See HS Communications, Inc., 7 FCC Rcd 6448, 6454 ¶¶ 18-23 (Rev. Bd. 1992), rev. denied, 8 FCC Rcd 3237 (1993).
- 45. Nor is there merit to Clanton's proposed conclusion that Selznick has no assurance of a \$40,000 loan from Mr. Dailey. CPF at ¶ 107. First, Clanton errs in arguing that the "only evidence" of Mr. Dailey's commitment is his deposition testimony. Id. In Mr. Dailey's August 27, 1993 sworn written Declaration, he stated:

"In late July, 1993, Ms. Selznick and I had a telephone conversation in which Ms. Selznick told me that she had spoken with several brokers and consultants. She reported to me that she was advised that a much more streamlined approach to both construction and operations would be advisable for a start-up radio station. Specifically, Ms. Selznick informed me that she was advised that the funds necessary would be less than \$110,000. With the substantially lower amount in mind, Ms. Selznick also advised me that she thought she would be able to provide almost all of the funding herself. We agreed that Ms. Selznick would provide as much of the funding as she could and that I would make up the difference with a loan of up to \$40,000.

If my funding is required, I am willing to provide a loan of up to \$40,000 for a term of 5 years at an interest rate of

12% with payments to commence one year after completion of construction of the radio station.

See "Opposition of Selznick to Petition to Enlarge," filed September 16, 1993, at Appendix A, ¶¶ 3-4. 16/ Second, Clanton errs in arguing that the record is "bereft" of evidence regarding Mr. Dailey's present financial ability to make a \$40,000 loan to Ms. Selznick. CPF at ¶ 107. The record includes a copy of Mr. Dailey's financial statement of August 27, 1993. Id. at Appendix A, Exhibit B. 17/

46. Likewise, there is no merit to Clanton's proposed conclusion that Ms. Selznick does not have sufficient available net liquid assets to meet her Revised Budget of \$109,460. CPF at ¶¶ 110-113. First, Clanton presents no sustainable basis for reducing Ms. Selznick's funds from the sale of her two New York apartments. Unlike the reduction for "vacant land" in Port Huron Family Radio, Inc., 5 FCC Rcd 4562, 4563 (1990), Selznick has supported her liquidity analysis regarding her two apartments with expert appraisals based on recent comparable sales. See Selznick Exhibit 5 at Appendices E & F. Second, even if Clanton is correct that Ms. Selznick's "receivables" (her \$8,000 inheritance and \$25,000 retirement fund proceeds) are reduced by the amounts requested by Clanton, Ms. Selznick still would have cur-

^{16/} Mr. Dailey's sworn Declaration, <u>supra</u>, also refutes Clanton's argument that there is no evidence regarding the terms on which a loan of up to \$40,000 would be made. <u>Id.</u> at Appendix A, ¶ 4. Moreover, the understanding as to collateral is the same as it was when Mr. Dailey was willing to loan up to \$360,070. Selznick Exhibit 5 at ¶ 4.

^{17/} See note 9, supra.

rently available liquid assets of \$270,000.00 (\$40,000 in cash + \$20,000 in retirement funds + \$6,000 inheritance receivable + \$204,000 real estate proceeds). When her current liabilities of \$176,300 are subtracted, her available net liquid assets still would total \$93,700. Even those personal funds, plus the available \$40,000 loan from Mr. Dailey, total \$133,700 -- approximately 30% more than the funds estimated in the Revised Budget to be needed for the station. In sum, Selznick is, at present, financially qualified.

CONCLUBION

The added issues should be resolved in favor of Selznick.

Respectfully submitted,

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March 18, 1994 Counsel for Loren F. Selznick

CERTIFICATE OF SERVICE

- I, Karen Anderson, do certify that a copy of the foregoing "Reply Findings/Conclusions for Loren F. Selznick" was served by pre-paid, First Class U.S. Mail on this 18th day of March 1994, on the following:
 - * Honorable John M. Frysiak
 Room 223
 Federal Communications Commission
 2000 L Street, NW
 Washington, DC 20036
 - * Paulette Laden, Esq.
 Hearing Branch -- Room 7212
 Federal Communications Commission
 2025 M Street, NW
 Washington, DC 20054

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Varan Andorson